Supreme Court, U.S.
FILED
JUN 27 1998
OFFICE OF THE CLERK

No. 97-1927

In The

Supreme Court of the United States

October Term, 1997

RODNEY C. HANLON, JOEL SCRAFFORD, RICHARD C. BRANZELL, ROBERT PRIEKSAT AND KRIS A. McLEAN,

Petitioners,

v.

PAUL W. BERGER AND ERMA R. BERGER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the application of this Court's settled qualified immunity standards to particular facts require this Court's review?

2. Does a decision finding that law enforcement violates the Fourth Amendment when a Department of Justice attorney and federal agents conspire to allow the media to enter private property and to film and to record private persons and conversations while federal agents execute a search warrant which does not authorize the presence or actions of the media require this Court's review where there is no conflict between the decisions of the United States Courts of Appeals on this issue?

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RESPONDENTS' BRIEF IN OPPOSITION

Petitioners Paul W. Berger and Erma R. Berger (the "Bergers") respectfully submit their opposition to the Petition for Writ of Certiorari filed by the Government Agent Petitioners, Special Agents of the United States Fish & Wildlife Service ("FWS") Rodney C. Hanlon ("Hanlon"), Joel Scrafford ("Scrafford"), Richard C. Branzell ("Branzell") and Robert Prieksat ("Prieksat"); and Assistant United States Attorney Kris A. McLean ("AUSA McLean") (collectively the "Government Agents").

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 129 F.3d 505 and entitled *Berger v. Hanlon*. App. 1a. The decisions of the District Court are unreported. App. 27a, 48a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment on November 13, 1997, reversing in part and affirming and remanding in part, the District Court's dismissal of the Bergers' two related civil actions. The Government Agent and Media defendant-appellees filed separate Petitions for Rehearing and Suggestion for Rehearing En Banc which were both denied

on February 25, 1998.[1] App. 61a. The Government Agents and Media filed Petitions for Writs of Certiorari which were both docketed on May 28, 1998. Justice Sandra Day O'Connor extended the time to oppose the Petitions until July 27, 1998.[2] This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fourth Amendment to the United States Constitution, which provides that,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. Const. amend. IV.

Section 3105 of Title 18 of the United States Code also applies in this case and provides that,

[1] The Media Petitioners are Cable News Network, Inc. ("CNN"), CNN correspondent Jack Hamann ("Hamann"), Turner Broadcasting System, Inc. ("Turner"), Robert Rainey ("Rainey") and Donald Hooper ("Hooper") (collectively the "Media"). The Bergers have filed a separate Brief in Opposition to the Media's Petition.

[2] On June 29, 1998, the Bergers filed a Conditional Cross-Petition to the Media's Petition pursuant to United States Supreme Court Rule 12.5.

> A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

18 U.S.C. § 3105.

STATEMENT OF THE CASE

The Government should not be allowed to use a search warrant as a "press pass" for the Media. In March 1993, the Government Agents, including an Assistant United States Attorney, were engaged in a confidential investigation.[3] The Government Agents knew that the investigation was confidential. Their plans included obtaining a sealed search warrant. Yet, when the Media asked to videotape and to record the search of the Berger Ranch for a story, the Government Agents readily obliged, agreeing to accommodate the Media in exchange for favorable publicity. What is troubling about the Government Agents' characterization of the facts before this Court is their minimization of their actions.

The Government Agents' conduct was nothing less than outrageous. Star-struck and eager, the Government Agents conspired with the Media to allow the Media to enter private property and to film and to record the

[3] The Government was investigating allegations that Mr. Berger improperly used a pesticide to control predator attacks on his sheep and killed federally-protected eagles as a consequence.

Bergers and their conversations while Government Agents executed a sealed search warrant which did not authorize the presence or actions of the Media. The Department of Justice attorney actually executed a contract with the Media allowing the Media to join the search. The Government Agents assisted the Media to videotape and to record staged scenes, gave on-camera interviews and helped to divert discovery of the Media's identity by the Bergers. The Department of Justice attorney actually agreed to, and did, hold an "exclusive" press conference on the Bergers' property in order to provide footage for the broadcast. The Government Agents were intertwined and indistinguishable from the Media.

The Government Agents exceeded the extent to which clearly established Fourth Amendment rights can be invaded by law enforcement in the execution of a search warrant. They are not protected by qualified immunity. Although Mr. Berger was acquitted of felony charges and convicted of a misdemeanor for using a pesticide contrary to its labelling, to all the world Mr. Berger was unwittingly cast by the Government Agents and the Media as a rogue rancher who killed eagles.

A. Factual Background

In early 1993, the Media contacted Agent Scrafford and initiated negotiations with AUSA McLean on behalf of the Government to join a law enforcement investigation. ER 1:¶¶34-36, 37/A; ER 5/A; ER 2:¶2; ER 6:¶¶18-20;

ER 8/7:36:5-25.[4] Those efforts resulted in the March 11, 1993 written agreement ("Agreement"), executed between AUSA McLean and CNN's Hamann, under which the Media were given "exclusive access" to the Berger Ranch to use as the backdrop for, and the search as a source of, video and audio recordings ("outtakes") which the Media intended to and did broadcast repeatedly worldwide on their various television outlets. App. 4a-5a; ER 1/A; ER 5/A; ER 8/1[5] ; ER 1:¶¶34-40; ER 6:¶¶1, 18-24, 34-50, 68, 69. The Media, in turn, granted the Government Agents' express desire to publicize their personal efforts to enforce environmental laws. ER 8/1, 8/2, 8/8:T11:7-8.[6]

A week later, a United States Magistrate Judge issued the search and seizure warrants but was never advised of the Agreement nor of the Media's intended participation. The Magistrate Judge did not authorize the Media's presence, nor their cameras and microphones. ER 8/3, 8/4; ER 1:¶¶47-48; ER 6:¶¶25-27. The search warrant only

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[4] Citations are to the Excerpts of Record ("ER") filed by the Bergers in Hanlon Appeal No. 96-35261 to the tab number within the ER and the exhibit number and/or page and/or paragraph number within the tab.

[5] Under the unsigned March 5, 1993 version of the Agreement, the FWS agreed to allow CNN to accompany its Agents in the execution of the search warrant; under the signed March 11, 1993 Agreement, CNN's permission was conferred by the United States Attorney's Office for the District of Montana instead of the FWS.

[6] References to "T[#]:[page]" refers to the [video]tape number and page(s) of the (incomplete) written transcription of the videotapes made during the Berger search entitled "Ring of Death." ER 8/8.

authorized a search of "The Paul W. Berger Ranch with appurtenant structures, excluding the residence." ER 6:¶28; ER 7:¶7.[7]

By pre-arranged plan, the Government Agents allowed the Media to be an integral part of the Government convoy of vehicles when the search of the Berger Ranch commenced before dawn on March 24, 1993. ER 8/8:T6-T7:2. With the Government Agents' assistance, the Media video and audio taped the convoy both from inside a Government vehicle and mounted one of their cameras on the exterior of another Government vehicle driven by Government Agents. ER 6:¶34; ER 8/8:T6:2-T7:2.

Media cameras were focused on Mr. Berger as he came upon the convoy while driving his pick-up truck down the county road at approximately 6:00 a.m. He stopped and was approached by Government Agents including Agents Scrafford, Branzell and Prieksat. ER 7:¶¶2-3; ER 8/8:T7:2. Mr. Berger was not given a copy of the search warrant but was told by Agent Scrafford that a search warrant was about to be executed at his Ranch and that the Court had ordered a search of every building;

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[7] The Media were also permitted by the Government Agents to participate in and videotape and record the pre-search briefing conducted on or about March 23, 1994. ER 1:¶¶49-52; ER 6:¶¶29-33; ER 8/2, 8/8T1:3-4, T3:1-5, T:1-6. The Media were made privy to confidential information about the Bergers and the criminal investigation against Mr. Berger, including details about the sealed warrants and their execution. In addition, the Government attorney had agreed to give the Media an "exclusive" interview on the Berger Ranch during the search. ER 8/2.

Agent Scrafford did not state that the residence was excluded. ER 6:¶36; ER 7:¶¶4, 7; ER 8/8:T7:6. Agent Scrafford requested to ride in Mr. Berger's truck back to the Ranch, claiming that he wanted to explain the situation to Mrs. Berger.[8] Mr. Berger drove him as requested. ER 7:¶5; ER 8/8:T7:1-16. Agent Scrafford informed Mr. Berger that he would be imprisoned in Billings if he did not cooperate with the federal authorities. ER 8/8T:3. Mr. Berger was shaking and very upset. ER 7:¶17; ER 8/8:102:13-15.[9]

The Media were active participants in the search, contrary to the Government Agents' characterization of the facts. Mr. Berger, for example, never knew that Agent Scrafford was the Media's human "boom mike." Agent Scrafford wore a hidden microphone installed by the Media to record secretly everything said, solely for the Media's benefit. ER 6:¶37; ER 7:¶5-6. Mr. Berger was not advised that the Media were videotaping and recording him, including his interrogation by Agents Scrafford, Branzell and Prieksat, who asked him leading questions about his alleged use of illegal poisons and eagle killing. ER 6:¶¶37, 38, 41-42; ER 7:¶¶5, 8-13; ER 8/8:T7:1-16. Mr.

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[8] Mrs. Berger was never a suspect or target of the underlying criminal investigation and was never charged with any criminal offense. No formal charges had yet been brought against Mr. Berger at the time of the search. ER 8:¶8; ER 8/3, 8/4.

[9] At the time, Mr. Berger was 71 years old, in poor health and on oxygen and medication, having been in and out of the hospital during the previous five months and just released ten days earlier for treatment of pneumonia and high blood pressure. ER 7:¶17.

Berger was never advised of any of his rights, including the right to remain silent. ER 6:¶¶39, 40; ER 7:¶¶9, 14; ER 8/8:T7:1-16.

The Government Agents knew that the Media could not lawfully enter the Berger Ranch. While Agent Scrafford would later testify that he advised the Media that they could not enter the Berger Ranch during the search, on the day of the search, he and the other Government Agents facilitated the Media's entry onto the Berger Ranch and into their residence. ER 8/7:37, 115; ER 8/8:T7:15-26. And although the Berger residence was excluded from the Search Warrant, Agents Scrafford and Branzell entered the Bergers' home and brought the Media microphone inside.[10] Unbeknownst to the Bergers, their conversations were secretly monitored and recorded by the Media through Agent Scrafford's hidden microphone. CNN/P 6; ER 6:¶48; ER 7:¶¶5, 6, 8, 10-13, 18; ER 8/8:T7:15-16.[11]

The Government Agents and Media worked jointly to conceal the Media's identity, presence and activities on the Ranch. ER 8/8:T8:13.[12] The Bergers were never

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[10] The Bergers contend that Agent Scrafford neither requested nor received permission from them to enter their residence. ER 6:¶¶45-46; ER 7:¶¶5-6; 8/7:115:7-116:4. The entry was well after Mr. Berger had been informed that every structure on his ranch was covered by the Warrant and that he would be imprisoned if he did not cooperate.

[11] Mrs. Berger was in the house. At the time, she was 81 years old and also recently hospitalized in ill health. ER 7:¶17.

[12] Hamann is depicted on the videotape of the pre-search briefing soliciting and discussing with the Government Agents alternative ways to avoid detection of the Media by the Bergers.

advised that the Media had entered the Ranch with the aid of the Government Agents and were conducting a private search by videotaping and recording the search on the Bergers' land and in the various buildings. ER 7:¶¶5, 6, 8, 10-13, 18; ER 8/8:T8:13. The Bergers believed that the Media were Government Agents as they were all dressed in "street" clothes like the Government Agents and were indistinguishable from the law enforcement personnel. ER 7:¶¶11, 12; ER 8/8:T6:3. Even after Mr. Berger discovered the videocamera and protested, Hamann deftly directed the camera elsewhere and Agents Branzell and Scrafford helped to divert Mr. Berger's attention by bombarding him with leading questions. ER 7:¶¶5,10; ER 8/8:T8:13.

Government Agents helped the Media set-up and obtain shots and provoked useful "sound bites" from Mr. Berger throughout the day-long search. ER 8/5, 8/2, 8/8:T11:2-8.[13] Many intrusive outtakes of Mr. Berger's images and statements, interiors of ranch buildings, outdoor locations and scenes of the Agents' search and seizure of "evidence" were incorporated into a Media program entitled "Ring of Death." ER 8/2, 8/8:T(entire). Although Mr. Berger was acquitted by a jury of three felony counts of killing at least one eagle and convicted

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These scenes were omitted from the written transcript provided by the Media. (ER 8/8) The Bergers offered the videotapes to the District Court by way of judicial notice under Fed. R. Evid. 201.

[13] The outtakes included on-camera interviews of Government Agents made at the Berger Ranch. During one lengthy interview, AUSA McLean made disparaging and personal remarks about Mr. Berger.

only of using a pesticide contrary to its labelling, a misdemeanor, Hamann introduced the segment by implying that Mr. Berger had killed hundreds of eagles.

Government Agents also helped the Media produce and promote the program. AUSA McLean breached his duties when he met with the Media numerous times during his confidential investigation and made confidential disclosures with the others, even on-camera with Hamann in an effort to do his "bit" for the environment. ER 1:¶¶35-44, 51-54, 74, 75; ER 8/8:T11:7-8. In addition, a few days before Mr. Berger's sentencing on the misdemeanor count, Agent Hanlon sent a letter on official Government stationery to "[a]ll participants in the Paul Berger (INV.4506AO) eagle poisoning investigations" announcing the broadcast schedule for the "Ring of Death" on Turner and CNN programs, "Earth Matters" and "Network Earth":

> the Paul Bergers and non-believers of the world will have a chance to see and hear the truth through the CNN video, not just in Sand Springs, Montana, but the whole WORLD. . . . Japan, Chile, France, and every place in between.

ER 8/10. CNN and Turner channels broadcast the segment nationally and internationally at least ten (10) times through April 1994. ER 8/8T12:1-3; 8/9:4. It may still be being broadcast somewhere in the world today.

B. Basis for Federal Jurisdiction Below

The Bergers filed two related civil actions against the Media and Government Agents in the United States District Court in Montana for constitutional violations under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the federal wiretap act (18 U.S.C. §§ 2510, *et seq.*), state common law, declaratory and injunctive relief and monetary damages.[14] On February 26, 1996, the District Court dismissed all counts in favor of the Government Agents and Media. District Court jurisdiction was pursuant to Title 28 United States Code Sections 1331 and 1367(a).

The Bergers' Notice of Appeal was timely filed on March 5, 1996, conferring jurisdiction on the Court of Appeals under Title 28 United States Code Section 1291. As to the questions presented and for the reasons discussed below, the Ninth Circuit held that the Bergers' rights were violated by the unauthorized Media foray onto their private Ranch.

The Ninth Circuit held that the Bergers' Fourth Amendment rights were violated. The Ninth Circuit recognized that at the time of the search in March 1993 the Fourth Amendment violation was "clearly established" law, relying on *Ayeni v. Mottola*, 35 F.3d 680, 682-684 (2d

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[14] The case against the Government Agents was initiated on March 21, 1995 (which included Media defendants Turner, Rainey and Hooper) and the First Amended Complaint was filed on May 16, 1995. The Bergers initially sued CNN and Hamann on March 24, 1994, filed the First Amended Complaint on March 21, 1995 and the Second Amended Complaint ("Complaint") on May 19, 1995.

Cir. 1994) (the law was "clearly established" in March 1992 that government officials cannot permit the media during searches), *cert. denied*, 514 U.S. 1062 (1995), *aff'g Ayeni v. CBS Inc.*, 848 F.Supp. 362 (E.D.N.Y. 1994); *Buonocore v. Harris*, 65 F.3d 347, 356 (4th Cir. 1995) (the law was "clearly established" in November 1992 that law enforcement cannot use a search warrant to facilitate private searches); and 18 U.S.C. § 3105 (prohibiting "any persons, other than law enforcement personnel and those assisting them from executing search warrants"). App. 11a-12a.

The Ninth Circuit properly refused to rely on the older, lower court decisions relied on by the District Court and by the Government Agents here, as inapposite. *See Higbee v. Times-Advocate, Inc.*, 5 Media L. Rep. (BNA) 2372 (S.D. Ca. 1980); *Moncrief v. Hanton*, 10 Media L. Rep. (BNA) 1620 (N.D. Oh. 1984). App. 35a. The Ninth Circuit noted that those cases did not involve the Media "as active participants in planned activity that transformed the execution of a search warrant into television entertainment, as happened here." App. 13a.

As to the Government Agents' conduct, the Ninth Circuit properly applied this Court's standard for qualified immunity in reversing the District Court and holding that the Agents were not immune from suit. App. 10a-11a (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The court concluded that "no reasonable officer could have thought it permissible" to invite the press "into the home of the person searched." App. 10a-11a (citing *Ayeni v. Mottola*, 35 F.3d at 686; *Buonocore*, 65 F.3d at 356; 18 U.S.C. § 3105). According to the Ninth Circuit, it was compelled to "heed the strictures on the potential abuse of law

enforcement powers" in applying the Fourth Amendment because:

> This was no ordinary search. It was jointly planned by law enforcement officials and the media, as memorialized by a written contract, so that the officials could assist in the media obtaining material for their commercial programming. The television cameras invaded the residential property of the plaintiffs and the microphone invaded their home. This search stands out as one that at all times was intended to serve a major purpose other than law enforcement. Yet, the federal agents obtained the warrant without disclosing the contract, the planned press presence, or the media's purpose . . . . This search violated [the Fourth Amendment's] protections.

App. 9a-11a.

WHY THE GOVERNMENT AGENTS' PETITION SHOULD NOT BE GRANTED

Review of qualified immunity is not warranted where, as here, the Ninth Circuit properly applied the legal standard settled by this Court. The Government Agents are dissatisfied with the result of settled qualified immunity doctrine, claiming to contest the source of the law for determining when the constitutional right allegedly violated was "clearly established" under a qualified immunity analysis. Government Agents' Petition ("Gov/P") [at page] 10. The Government Agents propose that absent precedent from this Court, "a more restrained approach . . . would be to look to other lower courts that

have fairly addressed the specific actions at issue and to consider whether those precedents indicate any clear trend in the law demonstrating the patent unlawfulness of that conduct." Gov/P 10-13. The Government Agents' rationale is that the Agents "cannot be expected to predict the future course of constitutional law." Gov/P 12 (citing *Procunier v. Navarette*, 434 U.S. 555, 562 (1978)).[15] The Government Agents' proposed approach, however, is irrelevant and was rejected by this Court long ago.

This Court has made clear that the restrictive application of the Fourth Amendment sought by the Government Agents is erroneous. *See Bivens*, 403 U.S. at 392-93 (this Court has consistently rejected an unduly restrictive view of the Fourth Amendment's protection against unreasonable searches and seizures such as the federal agents' thesis that invasion of privacy claims should be pursued in state court). Nor are factually similar cases required for determining when the law is "clearly established." *See United States v. Lanier*, 520 U.S. 259, 277 (1997) (holding that 18 U.S.C. § 242, like 42 U.S.C. § 1983 and *Bivens*, does not require the constitutional right allegedly violated to be first identified in a decision by this Court, or have been applied in a factual situation "fundamentally similar" to the one at bar). Furthermore, the Government Agents were never expected to predict the future as

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[15] The Government Agents took this Court's admonition out of context by omitting the remainder of the statement that an official cannot be expected to predict the future, "but he will not be shielded from liability if he acts 'with such disregard of the [plaintiff's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.' [citation omitted]." *Id.* at 563.

they argue, but were expected to conduct themselves with due regard to the constitutional rights they reasonably knew or should have known. *See Harlow*, 457 U.S. at 818.

This Court need not review the application here of this Court's precedents on qualified immunity. There is also no conflict between the decisions of the Courts of Appeals on the underlying constitutional question, the application of the Fourth Amendment to a conspiracy between Government Agents and the Media. Consequently, this Court's review is unwarranted.

I. THE NINTH CIRCUIT CORRECTLY APPLIED THIS COURT'S QUALIFIED IMMUNITY STANDARD AND THE ONLY DISPUTE IS IN ITS RESULT

The sum of the dispute raised in the Government Agents' Petition is that the Government Agents were entitled to immunity because "no decision by *any* court *anywhere* in the country had ruled that their actions were unlawful" and there were lower court decisions which upheld the lawfulness of the Agents' conduct. Gov/P 11 (emphasis in original). The Government Agents' arguments do not support review.

That the Ninth Circuit correctly applied this Court's qualified immunity standard cannot legitimately be disputed. According to this Court, government officials performing discretionary functions are not immune from liability for civil damages if their conduct violated a "clearly established statutory or constitutional right of

which a reasonable person would have known." *See Harlow*, 457 U.S. at 818 (an action for damages may be the only realistic avenue for vindication of constitutional guarantees when government officials abuse their offices); *Anderson v. Creighton*, 483 U.S. 635 (1987). Preexisting precedent on point is not required:

> the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful [citation omitted], but it is to say that in light of the preexisting law the unlawfulness must be apparent.

Id. at 640; *see Mitchell v. Forsyth*, 472 U.S. 511 (1985);[16] *see also Shoshone-Bannock Tribes v.*

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[16] The Government Agents' reliance on *Mitchell* does not support review. Gov/P 11. Forsyth sued U.S. Attorney General John Mitchell who, on behalf of the President, authorized a warrantless wiretap to investigate threats to national security by an anti-war group after this Court held in *United States v. United States Dist. Ct. (Keith)*, 407 U.S. 297, 322-23 (1972), that such conduct was unlawful. *Mitchell*, 472 U.S. at 515-16. Unlike here, where the Fourth Amendment restricts search warrants to protect privacy (*Katz v. United States*, 389 U.S. 347 (1967)) and federal agents are prohibited from allowing unauthorized private persons during searches (18 U.S.C. § 3105), the legality of warrantless national security wiretaps was never doubted since President Roosevelt authorized wiretaps of suspected subversives in the 1940's (*Mitchell*, 472 U.S. at 532) and the unpublished cases cited by the Government were in accord. Thus, unlike the privacy rights being enforced here, the unlawfulness of the warrantless national security wiretap was not established until after Mitchell placed the wiretap. *Id.* at 536.

Fish & Game Comm'n, Idaho, 42 F.3d 1278 (9th Cir. 1994).[17] App. 10a.

To determine that constitutional rights are "clearly established" the analysis begins by looking for Supreme Court and Ninth Circuit precedent. *Kirkpatrick v. Los Angeles*, 803 F.2d 485, 490 (9th Cir. 1986). Absent such precedent, the Ninth Circuit's approach is that,

> We begin by looking at those cases that are "most like" the instant case. . . . In the "absence of binding precedent," we look to all available decisional law. [citation omitted] This includes cases from state courts, other circuits and district courts.

Figueroa v. United States, 7 F.3d 1405, 1409 (9th Cir. 1993); *Backlund v. Barnhart*, 778 F.2d 1386, 1389-90 (9th Cir. 1985) ("on point" precedent to defeat qualified immunity not necessary because "[t]here may be cases of conduct so egregious that any reasonable person would have recognized a constitutional violation"); *see Ostlund v. Bobb*, 825 F.2d 1371, 1374 (9th Cir. 1987) (Ninth Circuit applied case law that occurred three years *after* the complaint was filed arguing that defendants "cannot use the absence of case law directly on point to shield them from liability").

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[17] Ninth Circuit analysis of qualified immunity is a 3-part test: (1) identification of the right allegedly violated, (2) whether the right was clearly established so that a reasonable official would have been aware of it and, (3) whether a reasonable official could have believed that the conduct at issue was unlawful. *Shoshone-Bannock Tribes*, 42 F.3d at 1285-86; *Sloman v. Tadlock*, 21 F.3d 1462, 1467 (9th Cir. 1994) (quoting *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991)). This analysis is in full compliance with this Court's decisions.

The constitutional rights sought to be enforced here under the Fourth Amendment were established long ago to protect the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . . " *See Soldal v. Cook County*, 506 U.S. 56, 61 (1992); *see Boyd v. United States*, 116 U.S. 616, 630 (1886). The Fourth Amendment has also long required that when government invades a person's privacy by executing a search the interruption must be minimal. *See Bivens*, 403 U.S. at 395 n.7 (citing *Marron v. United States*, 275 U.S. 192, 196 (1927)); *see Katz v. United States*, 389 U.S. 347, 353-57 (1967) (the Fourth Amendment warrant requirement is intended to protect a person's reasonable expectation of privacy).

The Ninth Circuit correctly looked to pre-existing case law on point in deriving its reasoned conclusion. App. at 10a-11a. When in March 1992, a Secret Service agent allowed a CBS camera crew to videotape and record a search in *Ayeni v. CBS Inc.*, the District Court denounced that conduct and denied qualified immunity on the ground that a private home is not a soundstage for law enforcement theatricals and held that the agent's conduct was "so far from then well established acceptable constitutional behavior that no case law precedent was needed to alert him to the fact that the execution of a warrant for the benefit of private persons violated the Constitution. . . . " *Ayeni v. CBS Inc.*, 848 F. Supp. at 368. The Government Agents knew that the Media should not enter the Berger Ranch during the search but allowed them to enter, ER 5/7:37:2-13 (Scrafford testimony); 8/7:37, 115. *See Bivens*, 403 U.S. at 394 n.7.

The Ninth Circuit properly refused to consider the older, lower court and unpublished decisions relied on by the Government Agents and District Court.[18] Govt/P 11; App. 35a. These cases have no constitutional force and effect as they did not recognize a Fourth Amendment privacy right which this Court has clearly upheld in superseding decisions. *See Winston v. Lee*, 470 U.S. 753, 758-762 (1985) (recognizing that the Fourth Amendment protects expectations of privacy); *see, e.g., Soldal v. Cook County*, 506 U.S. at 61 (Fourth Amendment protection against unreasonable searches and seizures applies in civil cases even if no invasion of privacy is alleged). Moreover, these cases have no precedential value and do not "clearly establish" the law. *See Woodward v. Worland*, 977 F.2d 1392, 1397 (10th Cir. 1992); *see also Fox v. Acadia State Bank*, 937 F.2d 1566, 1570 (11th Cir. 1991). Further, the Ninth Circuit distinguished these unreported decisions as considering passive government and press conduct quite different from that occurring here.

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[18] The Government Agents' reliance on these cases is unavailing. *See Higbee*, 5 Med. L. Rptr. at 2372 (turned on a restrictive characterization of the privacy right); *Moncrief*, 10 Med. L. Rptr. at 1620 (erroneously held that a constitutional wrong required violation of a *non*-4th Amendment privacy right (*e.g., Roe v. Wade*, 410 U.S. 113 (1973)); *Prahl v. Brosamle*, 295 N.W.2d 768, 774 (1980) (issue was limited to whether a reasonable search and seizure, without more, is made unreasonable when the media shows up to film where there is no agreement with or participation of law enforcement); *Avenson v. Zegart*, 577 F.Supp. 958, 962 (D. Minn. 1984) (14th Amendment claim for equal protection not valid constitutional violation where invidious, class-based discrimination was not and could not be alleged).

The Ninth Circuit also looked to analogous cases. *See Buonocore v. Harris*, 65 F.3d at 356 (in November 1992 it was "clearly established" that the Fourth Amendment prohibits government agents from using a search warrant to facilitate a private telephone company employee's independent search of another's home for items not specified in the warrant); *see also Anderson v. WROC-TV*, 441 N.Y.S.2d 220, 226 (1981) (allowing the media to trespass would amount to a "general warrant equivalent to the writs of assistance which were so odious to the American colonists."). *See also Bills v. Aseltine*, 958 F.2d 697, 704 (6th Cir. 1992) (whether allowing a private person not assisting with the search to photograph premises was an unreasonable search is a jury question in case where private party who photographed items during search was not named in the § 1983 action).[19]

The Ninth Circuit, like the district court and Second Circuit in *Ayeni v. Mottola*, looked to federal statutes for guidance as well. App. 11a. Section 3105 of Title 18, United States Code, is one of a number of statutes restricting those who may be present during the execution of search warrants.[20] Cases construing § 3105 establish that the statute permits only designated officers and

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[19] The Ninth Circuit also noted *Stack v. Killian*, 96 F.3d 159 (6th Cir. 1996), which allowed the media's presence because the search warrant itself authorized photography and videotaping and which also held that the law was not "clearly established" at the time the search occurred in July 1991. App. 12a.

[20] *See* Title 18, Sections 3109 (knock and announce requirement limits the use of force to enter a private dwelling); 2234 (criminalizes willful exceeding of search warrant authority); 2236 (criminalizes the warrantless search of a private dwelling); and Rule 41, Federal Rules of Criminal Procedure,

others providing required assistance in the execution of the warrant to be present. *See Ayeni v. Mottola*, 35 F.3d at 687; *United States v. Clouston*, 623 F.2d 485, 486-87 (6th Cir. 1980) (telephone company employees authorized by search warrant to help identify stolen property); *United States v. Wright*, 667 F.2d 793, 797 (9th Cir. 1982) (state drug enforcement officer asked to assist in execution of federal drug search warrant); *United States v. Schwimmer*, 692 F.Supp. 119, 126-27 (E.D.N.Y. 1988) (private computer expert authorized by search warrant to locate computer files).[21]

For an Assistant United States Attorney and experienced federal agents to claim that they did not need to comply with either Section 3105 or the restrictions of the warrant beggars the imagination.[22] Not surprisingly, the

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regulates the issuance and execution of search warrants and provides an additional basis for interpreting the Fourth Amendment's reasonableness requirement.

[21] Other federal appellate cases illustrate the consequences of allowing unauthorized persons during searches. *See United States v. Sanchez*, 509 F.2d 886, 889 (6th Cir. 1975) (explosives found during warrantless search by federal Alcohol, Tobacco and Firearms agent suppressed when he entered premises with state police under search warrant for narcotics only); *United States v. Warren*, 550 F.2d 219, 225 (5th Cir. 1977) (evidence found during warrantless search by federal Drug Enforcement Agency agents suppressed based on unauthorized boarding of ship under Coast Guard authority only to make safety inspections).

[22] Nor can the Government Agents feign ignorance of their express duty to refrain from disclosing to the Media private facts about the Bergers and the confidential investigation of Mr. Berger. Department of Justice ("DOJ") personnel are specifically prohibited from disclosing such information to the media during an investigation, especially "subjective observations"

court found that the Government Agents were not authorized by the Magistrate Judge issuing the search warrant to allow the Media to join the search of the Berger Ranch. The Government Agents had never even claimed that they required the assistance of the Media pursuant to Section 3105. The Ninth Circuit then applied the law of qualified immunity as defined by this Court. There is no necessity for this Court to review that application of settled law.

II. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS ON THE LAW GOVERNING THE CONSTITUTIONAL ISSUE

The threshold constitutional issue presented involves Fourth Amendment restrictions on Government Agents' authority to invade individual privacy while in pursuit of law enforcement objectives. *See Marron*, 275 U.S. at 196; *Katz*, 389 U.S. at 355-57. The presence of private parties during law enforcement activities has long been

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about the character of persons under investigation, or references to investigative procedures, witnesses or evidence, or any opinion as to the person's guilt, where release "tends to create dangers of prejudice without serving any law enforcement function" and "could reasonably be expected to be disseminated by means of public communication." *See* 28 C.F.R. § 50.2(b)(1)-(6). The DOJ personnel are under an "obligation to preserve the privacy rights of our citizens, even though they may be under investigation for violation of the criminal laws." *See Department of Justice Manual*, 1-7.001 at 1-285 (1990-1 Supp.) ("Favoritism should be shown to no member of the media"); 1-7.000 (1993 Supp.). The Privacy Act imposes criminal sanctions for the willful disclosure of such information without written consent or court order. *See* 5 U.S.C. § 552a.

restricted unless authorized. *See* 18 U.S.C. § 3105; *Clouston*, 623 F.2d at 486-87; *Wright*, 667 F.2d at 797; *Ayeni v. Mottola*, 35 F.3d at 687. And where "state action" is demonstrated private parties are liable for constitutional violations. *See Dennis v. Sparks*, 449 U.S. 24, 27 (1980); *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983).

The older, lower court decisions relied on by the Government Agents which in the past found that the media's presence was not unlawful are of no consequence to the analysis where no Fourth Amendment privacy right was recognized or no "state action" was alleged. Gov/P 18. *See supra* at n. 17. These superseded and unpublished decisions have no precedential value. *See Winston*, 470 U.S. at 758-762; *Woodward*, 977 F.2d at 1397. These invalidated, unreported decisions do not create a conflict of law.

Other cases relied on by the Government also do not support review. The Fourth Circuit's decision in *Wilson v. Layne*, 141 F.3d 111, 1998 U.S. App. LEXIS 6863 (4th Cir. 1998) (en banc), and the Eighth Circuit's decision in *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1081 (1997), appear to dispute the Second Circuit in *Ayeni v. Mottola*, but are distinguishable and do not support a conflict of law. The *Wilson* court refused to follow this Court's clear authority and to decide the threshold constitutional issue which is part of the requisite analysis. *Wilson*, 1998 U.S. App. LEXIS 6863 at *23; *Siegert v. Gilley*, 500 U.S. 226, 232-23 (1991) (determination of the constitutional right is a threshold question); *Mitchell*, 472 U.S. 511; *Harlow*, 457 U.S. 800; *see also Shoshone-Bannock Tribes*, 42 F.3d 1278. Thus, *Wilson* is not in conflict with *Ayeni v. Mottola* and *Berger* on the reach of the Fourth Amendment

as the Fourth Circuit failed to decide the issue. Further, *Wilson* does not involve the active conduct present here.

Unlike this case, there were no allegations of "state action" in *Parker* from which to conduct an appropriate constitutional analysis. The District Court held not only that plaintiffs had not made allegations of concerted action by the press and police but also that the plaintiffs failed to offer any evidence of "any affirmative agreement." *Parker v. Clarke*, 905 F.Supp. 638, 642 (E.D. Mo. 1995), *aff'd in part and rev'd in part sub nom. Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1081 (1997). That case was not inconsistent with the Ninth Circuit's application of law; it just reached a different conclusion. Despite the majority's discussion, the underlying facts do not create a true conflict with the holding in this case. With the *Parker* court finding neither an agreement nor active conduct, *Parker* does not present a true conflict with the Ninth Circuit here.[23]

The Government Agents' reliance on the criticism of *Ayeni v. Mottola* in *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992), for failing to narrowly define the constitutional right allegedly violated, does not support restricting application of the Fourth Amendment here. Gov/P 13. This Court has long refused to restrict the protections afforded by the Fourth Amendment and there is no specificity requirement for alleging a constitutional violation even if "the very action in question has [not] previously been held unlawful." *Lanier*, 520 U.S. at 267 (citing *Anderson*, 483 U.S. at 640); *see Bivens*, 403 U.S. at 392-93. There is no clear conflict among the Courts of Appeals.

[23] Had the Eighth Circuit in *Parker v. Boyer* conducted the appropriate analysis it would have found, as the dissent pointed out, that the defendant news crew "acted in concert with the police" as "willful participant[s]" insofar as they contacted the police and solicited an invitation to join the police, were invited by a police sergeant and "came to the location with the police [in the police car] and could not have entered if the police had not done so first." *Id.* at 449. The police chief even testified that the media's conduct was unlawful where allowing the press to join a police search would constitute a trespass. *Id.* at 447. Even if there was a full inquiry, the *Parker v. Boyer* case is factually dissimilar based on the amount of evidence presented here.

CONCLUSION

For the reasons set forth in this opposition, the Bergers respectfully submit the Government Agents' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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